UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROSE M. HASKELL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-24-P-H***
	)	
LARRY G. MASSANARI,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff was capable of performing sedentary work. I recommend that the decision of the commissioner be vacated with directions to award the plaintiff benefits.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from degenerative disc disease and bulging discs at the L-4/L-5 and L-5/S-1 levels of the spine, with chronic low back pain;

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 9, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

chronic coccygodynia of unknown etiology, producing coccygeal low back pain; chronic migraine cephalgia; and depression, Finding 3, Record at 21; that at no time relevant to the decision had she suffered from an impairment or combination of impairments that met or equaled those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 4, *id*.; that she retained the residual functional capacity to perform sedentary work, with her ability to perform an otherwise full range of such work activity eroded only as follows: she could climb ramps and stairs only occasionally; could not climb ladders, ropes or scaffolds; could balance, stoop, kneel, crouch and crawl only occasionally; and needed to avoid concentrated exposure to vibration, the use of vibratory tools and walking on rough and uneven ground, Finding 7, *id*. at 22; that, to the extent inconsistent with these limitations, her testimony regarding her pain, general symptomology and functional limitations was found not fully credible and not fully consistent with the relatively minimal objective medical evidence in the record, Finding 8, *id*.; that her impairments prevented her from returning to past relevant work, Finding 9, *id*.; that, given her age (35), education (ninth grade) and work experience (unskilled), application of Rule 201.24 of Table 4, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion that the plaintiff was not disabled, Findings 5-6, 9-10, *id.;* and that she therefore had not been under a disability at any time prior to the date of decision, Finding 11, *id*. The Appeals Council declined to review the decision, *id*. at 4-5, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff identifies four errors: (i) insufficient basis for finding that she retained the residual functional capacity for limited sedentary work or that the sedentary employment base was not too eroded to allow use of the Grid; (ii) failure to obtain an examination, use a medical advisor or otherwise adequately develop the record, resulting in the rendering of a decision not supported by substantial evidence; (iii) misinterpretation of the results of a discogram (intertwined with inadequate inquiry regarding subjective pain and unsupported credibility determination); and (iv) failure to consider whether the plaintiff met a listing (specifically, Listing 1.05C). Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5) at 2-14. Most of these alleged flaws flow from the administrative law judge's asserted mishandling of one critical piece of evidence – the discogram. *See generally id*. The plaintiff seeks remand with instructions to award benefits or, alternatively, remand for further consideration. *Id*. at 14. I agree that the commissioner's Step 5 finding is unsupported by substantial evidence. Remand with instructions to award benefits accordingly is warranted. *See Field v. Chater*, 920 F. Supp. 240, 243 (D. Me. 1995) ("When the Commissioner had a full and fair opportunity to develop the record and meet her burden at Step 5, there is no reason for the court to remand for further factfinding.").

I. Discussion

In assessing the plaintiff's residual functional capacity the administrative law judge relied on the only two such assessments of record, both by non-examining, non-testifying physicians: that of Peter Swartz, M.D.,[3] dated August 13, 1999 and that of Lawrence P. Johnson, M.D., dated November 17, 1999. *See* Record at 16, 130-45. Such reports, standing alone, theoretically can constitute "substantial evidence" in support of the commissioner's finding(s). *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 328 (1st Cir. 1990). However, the weight to which they are entitled "will vary with the circumstances, including the nature of the illness and the information provided the expert." *Id*. (citation and internal quotation marks omitted).

In these circumstances the reports cannot bear the weight they are made to carry. The administrative law judge inexplicably adopted every limitation delineated in the Swartz report save one – the plaintiff's need for a so-called sit/stand option. *Compare* Record at 16 *with id*. at 130-37. The need for frequent positional changes in a case in which a claimant's vocational history reflects unskilled work undermines reliance on the Grid. *See, e.g*., Social Security Ruling 83-12, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 40 ("Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS should be consulted to clarify the implications for the occupational base."); *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293 (1st Cir. 1986) ("[A] determination that a claimant is able to perform sedentary work must be predicated upon a finding that the claimant can sit most of the day, with occasional interruptions of short duration.") (citations and internal quotation marks omitted).

[3] I have done my best to decipher from Dr. Swartz's handwriting the spelling of his last name. *See* Record at 137.

In rejecting the sit/stand option the administrative law judge implicitly relied on the Johnson report, which did not identify any such limitation. *See* Record at 139. The Johnson report in turn cites in relevant part a January 1999 MRI showing "L4-5 minimal bulge. L5-S1 central bulge [without] neural compromise." *Id*. The discogram, performed subsequent to the Johnson report (in February 2000), revealed "a fissured disc which is an abnormal disc at L5-S1 which is causing the release of inflammatory material from inside of the disc to the outside and over the nerve root and hence causing pain." *Id*. at 237. This was not simply a recast of previous findings; it was a new diagnosis.[4] Although Dr. Johnson stated that his report "consider[ed] [claimant's complaints of] pain," *id*. at 144, one cannot be confident that his assessment of her capacity (including an ability to sit for six hours in an eight-hour day) would have remained unchanged in the wake of the revelation that the disc was leaking fluid. *See Gordils*, 921 F.2d at 330 (that non-examining physician did not have complete medical record before him when he formed his opinion "would be one factor counseling against assigning controlling weight to [his] functional conclusions standing alone").[5] Nor could the administrative law judge, as a layperson, judge that the presence of a fissured disc (versus a bulging disc) would have no bearing on assessment of ability to tolerate sitting or standing for extended periods of time. *See id*. at 329 (although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record").

[4] At oral argument counsel for the commissioner downplayed the significance of the discogram, suggesting that (i) the leakage may or may not have caused the claimed pain, (ii) the leakage could have been of contrast material used in the test rather than of disc material and (iii) in any event the discogram did not reveal any change in the plaintiff's physical condition. The first two assertions are flatly contradicted by the discogram report, which states unequivocally in relevant part: "This confirms that the patient does have a fissured disc which is an abnormal disc at L5-S1 which is causing the release of inflammatory material from inside of the disc to the outside and over the nerve root and hence causing pain." Record at 237. The third assertion is beside the point. As counsel for the plaintiff suggested at oral argument, a new diagnosis such as this can lend credence to previous reports of pain and functional limitation, possibly affecting a non-examining physician's judgment as to the extent of restriction imposed.

[5] Nor, for that matter, is it clear that Dr. Swartz's opinion regarding the plaintiff's residual functional capacity would have remained the same had he seen the discogram results. *See* Record at 136 ("2 physicians both say [claimant] is disabled, but neither provide[s] any

(continued on next page)

Under these circumstances, it behooved the administrative law judge to seek clarification from the non-examining physicians, the plaintiff's treating physician and/or a medical advisor. He did not, leaving his findings regarding the plaintiff's residual functional capacity unsupported by substantial evidence of record.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** with instructions to award the plaintiff SSD and SSI benefits.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of August, 2001.

David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-24

evidence of serious physical limitation.").

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Cause: 42:405 Review of HHS Decision (DIWC)

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